

Cite as 2009 Ark. App. 753

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR09-288

RONNIE DEAN DAVIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered NOVEMBER 11, 2009

APPEAL FROM THE JACKSON
COUNTY CIRCUIT COURT,
[NO. CR-2008-66]

HONORABLE HAROLD S. ERWIN,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Appellant Ronnie Dean Davis was convicted by a jury of sexual assault in the second degree and sentenced to ten years' imprisonment for engaging in sexual contact with an eleven-year-old girl who was sleeping in the home in which appellant and his girlfriend lived. On appeal, he contends that the trial court erred in denying his motions for directed verdict. We find no error and affirm appellant's conviction.

In the early morning hours of March 20, 2008, the victim and her friend were sleeping on the couch when appellant sat down on the couch with them. The victim testified that her friend woke her up and, when she woke up, appellant's hand was inside her panties and he was touching her private part. She said that she did not know how long his hand had been there but that she pushed his hand away and he stayed on the couch until her aunt, appellant's

girlfriend, came into the room. She testified that she started crying. The victim's friend testified that she and the victim were sleeping on the couch under a blanket and that early in the morning the victim woke her. She explained that appellant's leg and arm were under the cover by the victim and that his hand was on the victim's "private area." She said the victim kept trying to push appellant's hand off of her and then started crying and got off of the couch.

In a taped interview with police, appellant initially denied touching the victim but admitted being under the cover on the couch with the girls and putting his hand on the victim's leg. He eventually admitted that he had been drinking and that "curiosity or whatever got the best of [him]" and he put his hand on her private part "maybe for a couple of seconds" before the victim woke up.

Appellant was found guilty by a jury of sexual assault in the second degree in violation of Ark. Code Ann. § 5-14-125(a)(3), which provides in pertinent part as follows:

- (a) A person commits sexual assault in the second degree if the person:
 - (3) being eighteen (18) years of age or older, engages in sexual contact with another person who is:
 - (A) Less than fourteen (14) years of age; and
 - (B) Not the person's spouse[.]

Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2006). The jury sentenced appellant to ten years' imprisonment.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Reed*

v. State, 91 Ark. App. 267, 270, 209 S.W.3d 449, 451 (2005). On appeal, in reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Kelley v. State*, 375 Ark. 483, ___ S.W.3d ___ (2009). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005).

Appellant makes two arguments to support his contention that the State’s evidence is insufficient to support his conviction. First, he argues that the evidence was so conflicting as to be inherently improbable or clearly unbelievable. He references the alleged differing versions of the event given in testimony by the victim and her friend—specifically, who woke up whom. Second, he argues that the State failed to present evidence that he derived any sexual gratification from his contact with the victim. Before we address either of these arguments, we turn to the law governing motions for directed verdict.

In addition to requiring the defendant to challenge the sufficiency of the evidence by moving for a directed verdict at the close of the evidence offered by the prosecution and at the close of all of the evidence, which appellant did, Rule 33.1(a) of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict to “state the specific grounds therefor.” Ark. R. Crim. P. 33.1(a) (2009). The defendant is then bound by the scope and

nature of the objections and arguments presented at trial. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000). The reason underlying this requirement is that it allows the trial court the option of either granting the motion or, if justice requires, allowing the State to reopen its case to supply the missing proof. *Pinell v. State*, 364 Ark. 353, 219 S.W.3d 168 (2005). A further reason that the motion must be specific is that an appellate court may not decide an issue for the first time on appeal and cannot afford relief that is not sought in the trial court. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008).

Appellant's attorney made the following motion for a directed verdict after the State rested: "the State failed to prove that there was any sexual gratification by the defendant. And therefore there is insufficient evidence to support a conviction." At the close of all of the evidence, appellant's attorney simply renewed his motion for directed verdict "for the same reasons stated at the close of the State's case." While this was sufficiently specific to preserve appellant's argument regarding sexual gratification, appellant failed to mention his argument that the testimony was so conflicting as to be inherently improbable or clearly unbelievable; therefore, that argument is not preserved for our review.

We turn to appellant's argument that the State failed to present evidence that he derived any sexual gratification from his contact with the victim, which he contends is required to show he engaged in "sexual contact" with the victim. Pursuant to Ark. Code Ann. § 5-14-125(a)(3), the code section appellant was convicted of violating, the State was

required to prove that appellant engaged in “sexual contact” with another person who was under fourteen years of age and not married to appellant. “Sexual contact” is defined in Ark. Code Ann. § 5-14-101(9) as “any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female.” Appellant argues that no one testified that appellant was in any way “sexually aroused” or “gratified” by any contact with the victim.

The State is not required to provide direct proof that an act was done for sexual gratification if it can be assumed that the desire for sexual gratification was a plausible reason for the act. *Rounsaville v. State*, 374 Ark. 356, 360, 288 S.W.3d 213, 216 (2008) (involving challenge to rape conviction for inserting finger into victim’s anus). Rounsaville argued that it was not plausible to assume his actions were done for sexual gratification because the incident occurred while he was bathing the victim. The court disagreed with Rounsaville, quoting its holding in *Williams v. State*, 298 Ark. 317, 321, 766 S.W.2d 931, 934 (1989): “when persons, other than physicians or other persons for legitimate medical reasons, insert something in another person’s vagina or anus, it is not necessary that the state provide direct proof that the act was done for sexual gratification.” *Rounsaville*, 374 Ark. at 360, 288 S.W.3d at 216–17.

Appellant argues that no assumption of gratification arises here because there was no “insertion” in this case. We do not interpret the holding in *Williams* so narrowly. In

McGalliard v. State, 306 Ark. 181, 813 S.W.2d 768 (1991), although the nine-year-old victim testified only that the defendant touched her “between my legs . . . (indicating) right there in the middle . . . my private parts,” the court relied on *Williams* in holding that “we may assume that McGalliard touched the victim for sexual gratification and it is not necessary that the State prove that he was so motivated.”

The State was not required in this case to present direct proof that appellant’s act was done for sexual gratification. Testimony showed that appellant touched an eleven-year-old victim on her private parts while she was sleeping. He explained that he had been drinking and that his curiosity got the best of him. Decisions regarding the credibility of witnesses are for the trier of fact. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003). The factfinder is not required to believe any witness’s testimony, especially the testimony of the accused, because he is the person most interested in the outcome of the trial. *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003). We hold that there is substantial evidence in this case upon which the jury could infer that appellant’s actions were motivated by a desire for sexual gratification. It is not necessary that the State offer direct proof that he was so motivated. Accordingly, we affirm appellant’s conviction.

Affirmed.

BAKER and BROWN, JJ., agree.

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